Supreme Court, U.S.
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No. 92-1497

In The

Supreme Court of the United States

October Term, 1992

ROBERT W. LEA,

Petitioner,

versus

INDEPENDENT FIRE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is it a denial of due process for a district court to impose Rule 11 sanctions *sua sponte* on a represented party, without a separate hearing, when the Rule 11 violation became apparent during trial before the sanctioning judge?

II. Is it a denial of due process for a district court to sanction a party under the "represented party" clause of Rule 11, when the evidence at trial proved that after the party subjectively knew that his claims were meritless, he authorized additional claims and demands to be filed on his behalf?

III. Do supplemental proofs of loss executed by an insured during the existence of litigation, prepared to support claims alleged in the insured's pleadings against an insurer, and which become evidence at trial, constitute "other papers" under Rule 11?

LIST OF ALL PARTIES

Robert W. Lea ..... Petitioner

Independent Fire Insurance Company ..... Respondent

J. Randall Lea ..... Defendant

Elizabeth Lemoine Lea ..... Defendant

Richard Dennis Guffey d/b/a Dick Guffey Insurance ..... Defendant

Independent Insurance Group, Inc. ..... Parent Corporation of Respondent, Independent Fire Insurance Company

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COUNTERSTATEMENT OF THE CASE

In October 1990, Independent Fire Insurance Company ("Independent Fire") filed a Complaint in the Eastern District of Louisiana to obtain a declaration that it had no insurance policy in effect that provided coverage for fire damage occurring in February and March 1991 to certain apartment buildings near New Orleans, Louisiana owned jointly by Robert Lea, Randall Lea and Elizabeth Lea. In the alternative, Independent Fire sought a declaration that if a policy was in effect, it should be voided *ab initio* due to fraudulent misrepresentations contained in the application for insurance that was submitted to Independent Fire in January 1990 by the Leas' insurance agent, Dick Guffey. R., Vol. 1, p. 303.[1] Following the filing of Independent Fire's Complaint, the Leas filed a Counterclaim, alleging that coverage had been bound by virtue of the application for insurance. R., Vol.1, p. 283.

On March 28, 1991, three days after the deposition of Robert Lea, the Leas filed a Supplemental and Amending Counterclaim, asserting that Independent Fire was arbitrary and capricious in failing to pay their claim, and was thus liable for punitive damages under La. Rev. Stat. 22:658. R., Vol. 1, p. 230. Shortly thereafter, Independent Fire received three additional proofs of loss which sought

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[1] On Cross-Motions for Summary Judgment, the district court held that Dick Guffey was acting as an agent for the Leas when he submitted the application to Independent Fire. *Independent Fire Insurance Co. v. Lea*, 775 F. Supp. 921 (E.D.La. 1991). This ruling was reaffirmed following the trial on the merits, based on additional evidence presented at trial. *Independent Fire Insurance Co. v. Lea*, 782 F. Supp. 1144, 1156-57 (E.D.La. 1992). These rulings were not questioned on appeal.

a recovery for fire and vandalism damage to the apartment buildings allegedly sustained between March and September 1990. Robert Lea executed the proofs of loss. The claims set forth in the supplemental proofs of loss quadrupled the amount of the total claims asserted against Independent Fire. The proofs of loss were admitted into evidence at trial. *Independent Fire Insurance Co. v. Lea*, 782 F. Supp. 1144, 1158-59 (E.D.La. 1992).

On November 12, 1991, Independent Fire filed a Motion for Leave of Court to file a Second Supplemental And Amending Complaint. Attached to the Motion for Leave was the Second Supplemental And Amending Complaint, which incorporated the allegations of fraud contained in the original Complaint. R., Vol. 2, p. 389. Copies of these pleadings were served on Robert Lea at this time. Independent Fire now sought not only the declaratory relief originally prayed for, but also a recovery of attorney's fees and costs, as damages under Louisiana law. Although a magistrate-judge denied leave for the filing of Independent Fire's Second Supplemental And Amending Complaint, on review the district court found that under Fed. R. Civ. P. 15(a), Independent Fire should have been granted leave to file its Second Supplemental And Amending Complaint. R., Vol. 3, p. 862.[2]

A four-day trial on the merits commenced on January 6, 1992. On February 6, 1992, the district court entered its judgment and opinion. The court found Independent Fire had not issued an insurance policy to the Leas, and there

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[2] Neither the Leas nor Guffey appealed from this ruling. Robert Lea did not move to continue the trial.

was no "meeting of the minds" that a policy should have been issued. Furthermore, the court concluded that even if coverage was in effect, it would be voided for willful concealment or misrepresentations of material facts. 782 F. Supp. at 1154-1158. Although the district court declined to award fraud damages to Independent Fire under La. Civ. Code art. 1958, since no policy had been "rescinded", the district court *sua sponte* imposed Rule 11 sanctions solely on the Leas. *Id.* at 1158. The district court held: "The evidence in the present case shows that the Leas did not make the requisite reasonable inquiry into the facts and law underlying this case." *Id.* at 1159. The district court also found that after his deposition on March 25, 1991, when Robert Lea "unquestionably learned" of the material misrepresentations in the application for insurance, instead of repudiating Dick Guffey's actions, he endorsed the misrepresentations by persisting in a "wholly groundless" counterclaim and submitting additional proofs of loss (Plaintiff's Exhibits 86, 87 and 88) and an amended counterclaim seeking penalties and attorney's fees. The district court believed Rule 11 sanctions were in order because:

> Instead of reevaluating his claims against Independent Fire in light of the undisputed facts, Robert Lea added fuel to the fire [i.e., submitted additional proofs of loss and amended his counter-claim seeking penalties and attorney's fees against Independent Fire]. *Id.* at 1159.

The district court also noted that Independent Fire's Second Supplemental And Amending Complaint, which asserted a claim for damages, including attorney's fees,

was "more than sufficient notice for the imposition of Rule 11 sanctions since the identical action of the Leas supporting Independent Fire's claim for damages pursuant to La. Civ. Code Article 1958, formed the basis of the Court's award of sanctions in this case." *Id.* at 1162 n. 50.

Since Independent Fire had been seeking attorney's fees and costs as part of its damage claim, evidence of Independent Fire's litigation expenses were proven at trial. After trial, the Leas were given further opportunity to traverse the amount of Independent Fire's attorney's fees, but failed to do so. *Id.* at 1162. The district court awarded attorney's fees and costs incurred by Independent Fire from the time of Robert Lea's deposition. *Id.*

The Leas appealed the levy of Rule 11 sanctions to the Fifth Circuit Court of Appeals. Independent Fire cross-appealed the district court's refusal to award fraud damages. The Court of Appeals found that J. Randall Lea and Elizabeth Lemoine Lea, who were absentee landlords and had no direct personal involvement in the case, should not be sanctioned as "represented parties" under Rule 11.[3] However, the Fifth Circuit found that the occasion for and the amount of the sanction against Robert Lea was well within the objective standard of reasonableness and discretion vested in the district court. *Independent Fire Insurance Co. v. Lea*, 979 F.2d 377, 379 (5 Cir.

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[3] Robert Lea was a 50% owner of the apartments. His brother and sister-in-law, Randall Lea and Elizabeth Lea, owned the other 50%. At all times material, Randall and Elizabeth Lea resided in Springfield, Missouri, and Robert Lea resided in New Orleans.

1992). The Court of Appeals denied Robert Lea's Petition for Rehearing and Suggestion of *En Banc* Consideration.

SUMMARY OF THE ARGUMENT

When a district court finds, following a trial on the merits, that a represented party failed to make the necessary reasonable inquiry into the facts and law, and the party also signed a "paper" in violation of Rule 11, due process does not require that the court provide specific notice before imposing sanctions. Robert Lea knew that the factual basis of his claims against Independent Fire would be examined at trial. Robert Lea also knew that Independent Fire would be putting on evidence of the attorney's fees and expenses incurred because of his conduct. Robert Lea had an opportunity to prove his case, and he had an opportunity to traverse the evidence regarding the amount of attorney's fees and expenses incurred by Independent Fire.

Since the violation of Rule 11 became apparent during trial, in the presence of the judge, another hearing would be unnecessary and a waste of judicial resources. Based on Robert Lea's trial testimony, there was no question that when he signed the supplemental proofs of loss submitted to Independent Fire, and when an amended counterclaim seeking punitive damages on his behalf against Independent Fire was filed, he **subjectively** knew that there was no merit to his claims against Independent Fire. Since Rule 11 is governed by an **objective** standard, another trial would be superfluous. Accordingly, the

imposition of Rule 11 sanctions against Robert Lea in this case complied with due process.

Lastly, it is clear that under Rule 11, the phrase "other papers" is broad enough to include proofs of loss executed by a party and presented to an insurer, particularly when the proofs of loss are executed while litigation between the party and the insurer is pending, the proofs of loss are prepared to support a claim contained in the pleadings, and the proofs of loss are submitted into evidence at trial.

ARGUMENT

I. The Imposition of Rule 11 Sanctions Against Robert Lea Comported With Due Process

A. Robert Lea received adequate notice and a hearing.

In complaining that he had no notice or hearing before Rule 11 sanctions were imposed, Robert Lea overlooks the obvious fact that he knew the merits of his claims against Independent Fire would be questioned during trial. Robert Lea was sanctioned, among other reasons, for not making the reasonable inquiry into the facts and law required by Rule 11. *Independent Fire Insurance Co.*, 782 F. Supp. at 1159. He also knew Independent Fire was seeking a judgment against him for damages, including attorney's fees. Robert Lea had an opportunity to prove that there was a basis for his claims, but he failed to do so. The district court characterized Robert Lea's claims and allegations against Independent Fire as

"meritless", "wholly groundless", "specious", "outlandish", "uproariously offensive", and "frivolous". *Id.* at 1158-60.

After the 1983 amendments to Fed. R. Civ. P. 11, the advisory committee noted that the procedure for imposing Rule 11 sanctions "obviously must comport with due process requirements". Advisory Committee's Notes on Fed. R. Civ. P. 11, 28 U.S.C.A. p. 697 (West 1992). However, the advisory committee's reference to due process should not be viewed as a rigid mandate. Due process is a flexible concept. *Morissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). "The notice requirement for Rule 11 sanctions differs depending on the conduct subject to review." *Spiller v. Ella Smithers Geriatric Center,* 919 F.2d 339, 346 (5 Cir. 1990).

The form of "notice" under Rule 11 can range from an informal telephone call to a timely Rule 11 motion. In some instances, Rule 11 alone imparts sufficient notice. *Veillon v. Exploration Services, Inc.,* 876 F.2d 1197, 1202 (5 Cir. 1989); *Donaldson v. Clark,* 819 F.2d 1551, 1560 (11 Cir. 1987).

Although the Advisory Committee to Rule 11 noted that a "party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis of doing so", neither the text of Rule 11, nor the Advisory Committee Notes specifically address whether a court must provide notice when raising Rule 11 sanctions *sua sponte. Gibbes v. Rose Hill Plantation Development Co.,* 794 F. Supp. 1327, 1343 (D.S.C. 1992). However, the Fifth Circuit has observed that when a pleading is not

obviously defective, and a trial is necessary to demonstrate that a party's position is not well founded, "**a judge is not obliged to raise the sanctions issue initially before applying sanctions *sua sponte*.**" *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866, 881 (5 Cir. 1988) (emphasis added).

In this case, Robert Lea complains that Independent Fire never filed a pleading using the words "Rule 11" until the day judgment was entered. As noted above, even in those cases where notice is required, the form of notice is not sacrosanct. *Veillon*, 876 F.2d at 1202. Here, the district court found that Independent Fire's filing of its Second Supplemental And Amending Complaint constituted sufficient notice for the imposition of Rule 11 sanctions. *Independent Fire Insurance Co.*, 782 F. Supp. at 1162 n. 50. In its original Complaint, Independent Fire referred to the material misrepresentations contained in the application of insurance submitted to Independent Fire "with specificity and detail." *Id.* at 1159. Independent Fire alleged that the fraudulent conduct of the defendants, including Robert Lea, voided coverage, if coverage was in effect. In its Second Supplemental And Amending Complaint, Independent Fire simply incorporated its earlier allegations as a basis for seeking monetary (including attorney's fees) as well as declaratory relief. Robert Lea, as a defendant and counterclaimant, knew at trial he would be required to prove his claims and demands against Independent Fire. What further notice did Robert Lea (who is an attorney), need that his allegations would be tested at trial?

Robert Lea also had an opportunity during trial to traverse the amount and reasonableness of attorney's fees

and costs incurred by Independent Fire.[4] After trial, the district court held the record open to give Robert Lea further opportunity to traverse Independent Fire's damage claim, but Robert Lea failed to do so. *Id.* at 1162. Accordingly, Robert Lea waived his right to an evidentiary hearing. *Blum v. Stenson*, 465 U.S. 886, 892 n. 5, 104 S.Ct. 1541, 1545 n. 5, 79 L.Ed.2d 891 (1984); *Holley v. Guiffrida*, 112 F.R.D. 172, 173-74 (D.D.C. 1986); Schwarzer, *Sanctions under the New Federal Rule 11 - A Closer Look*, 104 F.R.D. 181, 198 (1985).

In this case, a violation of Rule 11 became manifest during trial. There were no other issues that needed to be illuminated by another hearing. Based on Robert Lea's trial testimony, the district court was well within its discretion in concluding that **subjectively**, Robert Lea knew that he was promoting meritless litigation by ratifying Dick Guffey's actions (i.e., seeking coverage based on an application which admittedly contained material misrepresentations), submitting additional proofs of loss and amending his counterclaim to seek penalties and attorney's fees against Independent Fire. 782 F. Supp. 1158-1159. Since the existence of a Rule 11 violation is tested under an objective standard, any testimony from Robert Lea as to his subjective state of mind is meaningless. *Cf. Rodgers v. Lincoln Towing Service, Inc.*, 596 F. Supp. 13, 27-28 (N.D.Ill. 1984), *aff'd*, 771 F.2d 194, 205 (7 Cir.

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[4] The district court found that Independent Fire's attorney's fees were "more than reasonable" and were considered by the court "to be an extremely conservative estimate of costs to Independent Fire on account of the Leas' additional claims." *Independent Fire Insurance Co.*, 782 F. Supp. at 1161 and 1161 n. 47.

1985). The advisory committee recognized that often the "judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary." Satellite litigation is discouraged. Advisory Committee Notes, *supra*. "When an attorney has failed to present necessary factual support for claims despite several opportunities to do so, for example, further hearing on the sanctions issue may well be not only unnecessary but also a waste of judicial resources." *Donaldson*, 819 F.2d at 1561.

In this case, Robert Lea had a chance to present factual support for his claims. Not only did he fail to do so, the evidence confirmed that after he unquestionably learned there was no factual basis for his claims, he expanded the scope of the litigation. Robert Lea also had an opportunity to traverse the amount of the sanction. A separate hearing on the sanctions issue would be unnecessary and a waste of judicial resources.

B. When a party is sanctioned sua sponte under Rule 11 after a trial on the merits for failing to make a reasonable inquiry into the facts and law and persisting in a meritless claim, due process does not mandate a separate notice and hearing.

Rule 11 provides, in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, **shall impose upon the person who signed it, a represented party, or both**, an appropriate sanction, which may include an order to pay to the other party or

> parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In this case, the district court identified an offending pleading (an amended counterclaim filed by the Leas and signed by their attorney), *and* an "other paper" (supplemental proofs of loss signed by Robert Lea during the pendency of the lawsuit and introduced as exhibits at trial) signed in violation of Rule 11. *Independent Fire Insurance Co.*, 782 F. Supp. at 1159.

Thus, in this case, as in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991), a represented party was sanctioned for signing a paper in violation of Rule 11. 111 S.Ct. at 934-935. In *Business Guides*, this court observed that it has not had "occasion to determine whether or under what circumstances a nonsigning party may be sanctioned" under Rule 11. 111 S.Ct. at 935. This case does not present such an occassion, since Robert Lea is a **signing** party.

Nevertheless, even if the Rule 11 sanction against Robert Lea was premised solely on the "represented party" clause of Rule 11, the jurisprudence does not require another hearing separate and apart from a trial on the merits, when the Rule 11 violation becomes apparent during the trial. Furthermore, a district court is not prohibited from imposing a Rule 11 sanction on its own motion prior to raising the issue. *Thomas*, 836 F.2d at 881.

As explained above, the notice requirement for Rule 11 is flexible. *Spiller*, 919 F.2d at 346 citing *Link v. Wabash*

Railroad Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), *reh. den.*, 371 U.S. 873, 83 S.Ct. 115, 9 L.Ed.2d 112 (1962). In *Link*, the district court dismissed *sua sponte* a diversity action arising out of the collision between an automobile and a train because plaintiff's counsel failed to appear at the pre-trial conference. The dismissal was based on the district court's inherent power, and there was no prior notice as to the possibility of a dismissal. 370 U.S. at 627-29; 82 S.Ct. 1387-88. Rejecting the petitioner's contention that the absence of notice and a hearing voided the dismissal, Justice Harlan explained:

> Nor does the absence of notice as to the possibility of a dismissal or the failure to hold an adversary hearing necessarily renders such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." But this does not mean that every order entered without notice in a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing. 370 U.S. at 632; 82 S.Ct. at 1389-1390. (citations omitted).

In *Link* this Court upheld the sanction of an outright dismissal – which plainly implicates greater due process

concerns than the assessment of attorney's fees[5] – despite the lack of any notice or hearing. Accordingly, any requirements of due process were clearly satisfied in this case.

On page 9 of his Petition to this Court, Robert Lea suggests that "[w]hen sanctions are applied to a party alone, as opposed to his attorney, both notice and a hearing directed to the Rule 11 issue are mandated by due process". *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27, *reh. den.*, ___ U.S. ___, 112 S.Ct. 12, 115 L.Ed.2d 1097 (1991), *Thomas v. Capitol Security Services, Inc.*, 836 F.2d 866, 879-881 (5 Cir. 1988) and *1488, Inc. v. Philsec Investment Corp.*, 939 F.2d 1281 (5 Cir. 1991) are cited for this proposition. However, these cases do not mandate that notice and a hearing is necessary, in all circumstances, before a district court imposes Rule 11 sanctions on its own motion.

In *Chambers*, the district court invoked its inherent power, rather than Rule 11, to sanction the party's bad-faith conduct. 111 S.Ct. 1228. This Court "discern[ed] no basis for holding that the sanctioning scheme of the statute [28 U.S.C. 1927] and the [Federal] rules displaces the inherent power to impose sanctions for the bad-faith conduct [of Chambers]." *Id.* at 2134. Whether the petitioner in *Chambers* received adequate notice and a hearing before the imposition of a sanction was not at issue. *Chambers* does not support Robert Lea's position that the

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[5] *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 n. 14, 100 S.Ct. 2455, 2464 n. 14, 65 L.Ed.2d 488 (1980).

imposition of Rule 11 sanctions against him violated due process.

In *Thomas,* although the Fifth Circuit said that a party seeking sanctions under Rule 11 should provide prompt notice of a violation, 836 F.2d at 879, the court was not speaking of the due process right to notification. Rather, the *Thomas* Court was referring to the importance of notice for the purposes of a non-violating party mitigating its damages, since Rule 11 permits the imposition of "reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." *Id.* at 878-880. See also *Spiller,* 919 F.2d at 346 n. 7. *Thomas* does not support Robert Lea's contentions.

It is true, as noted on page 17 of Robert Lea's Petition, that *Thomas* and *In re Yagman,* 796 F.2d 1165, 1184 (9 Cir. 1986), *mod. and reh. den.,* 803 F.2d 1085 (9 Cir. 1986), *cert. den.,* 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987), state that a court "should as a minimum notify the individual certifying the document that Rule 11 sanctions will be assessed at the end of trial if appropriate." *In re Yagman,* 796 F.2d at 1184; *Thomas,* 836 F.2d at 881. However, this "minimum notice" applies only "where a complaint or other paper is obviously defective." *Id.* These cases recognize that "[a] claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence." *In re Yagman,* 796 F.2d at 1183. Even if the information available to one side seems to indicate there is no basis for the other side's position, an adversary and judge are entitled to assume that the opponent is acting

reasonably and in good faith. *Thomas,* 836 F.2d at 881. In this case, the deficiency in Robert Lea's pleadings were not apparent until after trial.

In *1488, Inc.,* the Fifth Circuit did state that providing specific notice and an opportunity to respond "is particularly important in cases, such as the one before us, in which sanctions have been imposed on the clients and not the attorneys." 939 F.2d at 1292. Based on the record before it, the *1488, Inc.* Court believed that the defendants should have been given more of an opportunity to respond to a motion for Rule 11 sanctions made by a party; the district court ruled on the issue immediately, without giving the defendants an opportunity to prepare a written response. *Id.* at 1292. The panel in *1488, Inc.* specifically noted that its holding did not undermine previous findings that Rule 11, standing alone, will constitute sufficient notice of an attorney's responsibilities. *Id.* at 1292 n. 5 citing *Spiller,* 919 F.2d at 346. The *1488, Inc.* Court also noted a separate hearing is not a prerequisite to the imposition of Rule 11 sanctions. 939 F.2d at 1292 citing *Donaldson,* 1819 F.2d at 1560 n. 12. If the Fifth Circuit intended to hold in *1488, Inc.* that when a district court imposes Rule 11 sanctions on a party *sua sponte,* separate notice and a hearing is always a prerequisite, one would expect the Fifth Circuit to say so explicitly. Indeed, a panel of the same court had already explicitly rejected the contention that "district courts, must, in all instances, provide an offending party with notice of a Rule 11 violation before imposing sanctions, either *sua sponte* or at the request of opposing counsel. . . . " *Harmony Drilling Co., Inc. v. Kreutter,* 846 F.2d 17, 19 (5 Cir. 1988). Two years later, in *Henderson v. Department of Safety*

and Corrections, 901 F.2d 1288 (5 Cir. 1990), another panel of the Fifth Circuit held:

> An evidentiary hearing was unnecessary here. There are no issues of fact, only conclusions to be drawn from undisputed facts. The district judge's participation in the proceedings and the record itself provided the judge with sufficient knowledge of the relevant facts with respect to Penn's dilatory tactics. *Id.* at 1294.

The Fifth Circuit apparently does not see a conflict in its decisions, as it denied Robert Lea's Petition for Rehearing and Rehearing *En Banc*. Even if the decision of the Fifth Circuit in this case is viewed as inconsistent with *1488, Inc.*, it does not justify the grant of a writ of certiorari. Such conflict is better resolved by the Circuit itself. *Wisniewski v. United States*, 353 U.S. 901, 902, 77 S.Ct. 633, 634, 1 L.Ed.2d 658 (1957); 13 J. Moore & J. Lucas, *Moore's Federal Practice* ¶810.21, p. SC10-23 (2d ed. 1991).

In addition to the Fifth Circuit, several other circuits have upheld the imposition of Rule 11 sanctions without an evidentiary hearing, where a hearing would serve no useful purpose. *See, e.g., Chemiakin v. Yefimov*, 932 F.2d 124, 130 (2 Cir. 1991); *In re Knustler*, 914 F.2d 505, 521 (4 Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 1607, 113 L.Ed.2d 669 (1991); *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986). As the Seventh Circuit has held: "Where the sanctionable conduct occurred in the presence of the Court, there are no issues that a hearing could illuminate and hence the hearing would be pointless." *Kapco Manufacturing Co., Inc.*, 886 F.2d 1485, 1495 (7 Cir. 1989). The same logic applies in this case.

II. Robert Lea Signed a "Paper" Covered by Rule 11

On page 21 of his Petition, Robert Lea states:

> The Fifth Circuit Panel decision represents the first decision in federal jurisprudence applying Rule 11 to a client who had not signed the paper covered by Rule 11 and is directly contrary to the text of the Rule, the advisory committee's explanation of the 1983 amendment to the Rule, prior Fifth Circuit jurisprudence and this Court's jurisprudence upon which the Panel decision relies.

The above statement is misleading and misrepresents the Advisory Committee's Notes under Rule 11, prior Fifth Circuit jurisprudence and this Court's jurisprudence.

Rule 11, by its very terms, states that when "a pleading, motion, or other paper is signed in violation of this Rule", sanctions can be imposed directly upon: (1) the person who signed it, (2) a represented party, (3) or both. The Advisory Committee Notes specifically state: "Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client." Advisory Committee Notes, *supra* at p. 697. "The current Rule places an affirmative duty on the attorney or party to investigate the facts and the law prior to the subscription and submission of any pleading, motion or paper. . . . The rule applies to attorneys, parties represented by attorneys, and parties who appear *pro se.*" *Business Guides, Inc.*, 111 S.Ct. at 930 quoting 2A J. Moore & J. Lucas, *Moore's Federal Practice* ¶11.02[3], pp. 11-15 to 11-17, (2d ed. 1990).

In accordance with the Advisory Committee Notes, courts have recognized, depending on the circumstances, that it may be appropriate to impose sanctions on the represented party, his attorney or both. *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2 Cir. 1986), *cert. den.*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987); *Chevron, U.S.A., Inc. v. Hand*, 763 F.2d 1184, 1187 (10 Cir. 1985). In *Business Guides*, this Court recognized that often a party "is better positioned [than an attorney] to investigate the facts supporting a paper or pleading." 111 S.Ct. at 932. Rule 11 does not require that a represented party sign a pleading or paper before that party is sanctioned. *Homico Construction & Development Co. v. Ti-Bert Systems, Inc.*, 939 F.2d 392, 294 (6 Cir. 1991); *Oliveri*, 803 F.2d at 1274.

Secondly, Robert Lea **did** sign a paper covered by Rule 11. In order to support the claims in his pleadings, Robert Lea signed supplemental proofs of loss "quadrupling the amount of meritless claims against Independent Fire". These documents became evidence at trial, without objection. *Independent Fire Insurance Co.*, 782 F. Supp. at 1158-1159. The Advisory Committee Notes demonstrate that the phrase "other papers" in Rule 11 is to be viewed broadly; it even includes "discovery papers". Advisory Committee Notes, *supra*. Thus, interpreting the phrase "other papers" to include proofs of loss executed by a party and submitted in support of a claim while litigation is pending, and which are in turn made part of the court record, is far from being "directly contrary to the advisory committee's explanation of the 1983 amendments to the Rule", as suggested on page 21 of Robert Lea's Petition.

Courts have also construed the phrase "other papers" in Rule 11 to include *all* papers signed during the course

of a proceeding – not only pleadings. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2 Cir. 1988); *Oliveri*, 803 F.2d at 1274; *U.S. v. International Brotherhood of Teamsters*, 134 F.R.D. 50, 58 (S.D.N.Y. 1991); *American State Bank v. Pace*, 124 F.R.D. 641 (D.Neb. 1987).

Thirdly, the decision of the lower court in this case is not "directly contrary to . . . prior Fifth Circuit jurisprudence." On page 25 of his Petition, Robert Lea cites the following passage from *Thomas* as the "prior Fifth Circuit jurisprudence" on which he relies:

> While the drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceedings, they failed to do so and instead chose to expand only the categories of papers to which the rule applies. 836 F.2d at 875 n. 11.

The above language from *Thomas* is actually a quote from the Second Circuit's decision in *Oliveri*, which appears in 803 F.2d at 1274. Robert Lea, however, has taken this quote out of context, as a cursory reading of *Thomas* and *Oliveri* will reveal.

In *Thomas*, the sentence from the main text which immediately precedes footnote 11 quoted above states: "In any event, Rule 11 applies to each and every paper signed during the course of the proceedings and requires that each filing reflect a reasonable inquiry." 836 F.2d at 875. The next sentence then states: "Ample protection from the use of abusive tactics in litigation in respects other than the signing of papers is provided by other rules governing attorney conduct." *Id.* A further reading of the discussion beginning on page 873 of the *Thomas* decision, under the heading "Attorney's Obligations

under Rule 11" and continuing through page 875, makes it clear that the quote Robert Lea extracts from *Thomas* was not addressing the scope of the phrase "other papers." Rather, the *Thomas* Court was considering whether Rule 11 covered *conduct* other than the signing of papers.

A glance at *Oliveri* further underscores the true holding of *Thomas* and *Oliveri*. The entire paragraph in which the quote in question appears reads:

> In addition, when rule 11 was amended in 1983 to make sanctions mandatory, the rule was also amended to include the words "motion or other paper" each time after the word "pleading" was used. **Thus, amended rule 11 applies to every paper signed during the course of the proceedings and not only to the pleadings.** While drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceedings, they failed to do so and instead chose to expand only the categories of papers to which the rule applies. *Oliveri*, 803 F.2d at 1274 (emphasis added).

As can be seen, the quote upon which Robert Lea's argument rests is used by the Second Circuit in *Oliveri* to explain that the conduct sanctionable under Rule 11 was the signing of papers, rather than the entire conduct of the proceeding. The *Oliveri* Court was not, in any way, imposing a limitation on the type of "paper" covered by Rule 11. Any doubt as to the correct intendment of the quoted language from *Oliveri* is erased by the Second Circuit's declaration in *Calloway* that:

> *Oliveri v. Thompson*, 803 F.2d 1265 (2 Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94

> L.Ed.2d 689 (1987), established that Rule 11 applies to all papers filed in a lawsuit and that the signer's conduct should be judged at the time the paper is signed. *Calloway*, 854 F.2d at 1470.[6]

Lastly, on page 23 of his Petition, Robert Lea asserts: "Significantly, the 'papers' referred to in the Rule do not include documentary evidence unless the evidence is attached to a pleading, such as an affidavit, in support of a complaint or a temporary restraining order." Robert Lea cites *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) and *Business Guides* in support of this proposition.

However, nothing stated in *Cooter & Gell* or *Business Guides* even remotely reflects that this Court views Rule 11 as **excluding** documentary evidence that is not attached to a pleading. The "papers" in *Business Guides* were papers submitted in support of a temporary restraining order. 111 S.Ct. at 930. In *Cooter & Gell*, the "paper" was an anti-trust complaint. 110 S.Ct. at 2452. Neither decision addresses the scope of the phrase "other papers."

When the district court's opinion in this case is read *in toto*, it is clear that the court correctly viewed Robert Lea's submission of supplemental proofs of loss and a Supplemental and Amending Counterclaim as a ratification of the material misrepresentations set forth in the

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[6] See also *U.S. v. International Brotherhood of Teamsters*, 134 F.R.D. at 58, wherein the court held: "Rule 11 applies to 'every paper signed during the course of proceedings.' " citing *Oliveri*, 803 F.2d at 1274.

application for insurance presented to Independent Fire. Even if Robert Lea originally was unaware that the application contained material misrepresentations, when he amended his counterclaim against Independent Fire and submitted additional proofs of loss, he was unquestionably aware that his claim was premised on a fraudulent application. Assuming Robert Lea was not initially responsible for the misrepresentations in the application, he ratified his agent's conduct by persisting in his action. The signing and submission of supplemental proofs of loss to an opposing party certainly furthered Robert Lea's groundless claim.

Contrary to the express language of Rule 11, Robert Lea suggests, on pages 23-24 of his Petition, that an Amended Complaint – a pleading – is not a paper covered by Rule 11. Furthermore, it is irrelevant that Robert Lea did not verify the Amended Complaint. The necessity of verification for such a pleading was dispensed with by Rule 11 before the 1983 amendments. See *Frank R. Jelleff, Inc. v. Braden,* 233 F.2d 671, 675 (D.C. Cir. 1956). The Rule 11 duty to conduct a reasonable inquiry into the facts and law is imposed on attorneys and parties alike. *Business Guides,* 111 S.Ct. at 930.

Robert Lea also cites *Homico Construction & Development Co. v. Ti-Bert Systems, Inc.*, 939 F.2d 392 (6 Cir. 1991) as authority for the proposition that a client can be sanctioned under Rule 11 only if it is determined that his attorney has filed a pleading or other paper which is frivolous or filed for an improper purpose. In this case, the district court concluded that Robert Lea's Amended Counterclaim seeking punitive damages from Independent Fire, and the submission of additional proofs of loss,

were "frivolous." *Independent Fire Insurance Co.*, 782 F. Supp. at 1158-1160. The district court obviously concluded that it was Robert Lea who was responsible for the promotion of baseless litigation, since the evidence showed that he had direct personal involvement in the management of the litigation, as well as the apartment buildings. Robert Lea also dealt directly with Dick Guffey. 782 F. Supp. at 1159. On this basis, the Fifth Circuit upheld the Rule 11 sanctions against Robert Lea. *Independent Fire Insurance Co.*, 979 F.2d at 379. This Court recognized in *Business Guides* that, as a matter of policy, there is no justification for not holding represented parties to a reasonable inquiry standard, because often the client is in a better position than the attorney to investigate the facts supporting a paper or pleading. 111 S.Ct. 932. Rule 11 plainly states that when a pleading, motion, or other paper is signed in violation of Rule 11, sanctions may be imposed "upon the person who signed it, a represented party, or both,. . . . " Imposing sanctions on an attorney should not be a prerequisite for sanctioning a represented party, when the court believes that the party bears primary responsibility for the violation.

CONCLUSION

The Fifth Circuit concluded that the *sua sponte* sanction imposed on Robert Lea by the district court was "well within the 'objective standard of reasonableness' and the discretion vested by necessity in the trial court." *Independent Fire Insurance Co.*, 979 F.2d 379.

The first pleading filed in the court record – Independent Fire's original Complaint – notified Robert Lea that Independent Fire believed he was advancing a fraudulent claim. Robert Lea was also notified that Independent Fire would be seeking damages caused by his fraudulent conduct and that of his agent, Dick Guffey. During trial, Robert Lea failed to produce any credible evidence in support of his claims. Indeed, the evidence overwhelmingly proved that Robert Lea subjectively knew there was no basis for his claim that Independent Fire had insurance coverage, or had issued a policy. 782 F. Supp. at 1144.

The violation of Rule 11 became manifest during trial. Another hearing, after trial, was unnecessary and would only be a waste of judicial resources. Robert Lea did not and has not questioned the reasonableness of the attorney's fees awarded by the court, notwithstanding the opportunity to do so.

The judgments of the district and appellate courts are in accord with well-established jurisprudence and do not present a conflict with the decision of any other circuit, or this Court. For these reasons, Independent Fire prays that Robert Lea's Petition for Writ of Certoriari be denied.

Respectfully Submitted,

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